Corporate Social Responsibility between Self-Regulation and Government Intervention: Monitoring, Enforcement and Transparency

Jentsch, Valentin

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VALENTIN JENTSCH*

Abstract

The existing rules and standards on corporate social responsibility can best be described as a hybrid legal architecture, where various regulatory approaches maintain a friendly coexistence. This type of multilevel rule-making is sometimes perceived to be complicated and not very effective because it is often said to leave some areas of economic activity unregulated and, in any case, unenforced. Given this difficulty, it becomes evident that the interaction between the different regulatory strategies currently in place, ranging from self-regulation to government intervention, has to be analyzed in more detail. Scholars have often argued that there is a governance gap because public international law only provides for certain rights, but no obligations, for transnational companies. What scholars sometimes miss, however, is that the law, although indirectly, does in fact already regulate corporate behavior with regard to human rights, labor, the environment and anti-corruption.

In this article, I identify and describe various monitoring, enforcement and transparency mechanisms through which international soft law standards are backed up by national public and private law rules. The importance of this is that it will help us better understand what the role of the law is in the *status quo* with regard to corporate social responsibility.

Keywords

Corporate social responsibility, regulatory theory, transnational governance, legal theory, business and human rights, business and the environment

Introduction

The relationship between corporate social responsibility and the law has changed considerably, and even today this relationship is not nearly as stable as it might seem, partly because the concept of corporate social responsibility is still in a state of flux.

* Dr. iur., LL.M., Attorney at law, FAN Fellow at the University of Zurich, Visiting Scholar at Humboldt University of Berlin.

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The European Commission, for example, previously defined corporate social responsibility as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".[1] This definition reflects the earlier understanding that corporate social responsibility is supposed to be something of a pure voluntary nature and something that actually goes *beyond* the law, but completely ignores the fact that corporate social responsibility can sometimes also be brought *through* the law or serve as a control mechanism *for* the law.[2] This view has been challenged over time, in particular because of concerns over the limitations of the business case for corporate social responsibility; because of the fact that the law plays an important role in regulating corporate social responsibility; and because of the belief that socially and economically driven reputation and market forces can in turn also enhance the effectiveness of the law.[3] In order to realign its approach to corporate social responsibility with international developments, in part also to address the above critique in legal and socio-economic scholarship, the European Commission has considerably broadened its definition of corporate social responsibility to "the responsibility of enterprises for their impacts on society".[4] This is, of course, very broad and quite diffuse and consequently leaves the concept open to many interpretations. In this article, I look in particular at the responsibilities of transnational companies concerning human rights, labor, the environment and anti-corruption, as this is basically what the international legal and policy framework dictates.

In the *status quo*, the existing rules and standards on corporate social responsibility in some sense qualify as a hybrid legal architecture.[5] Public international law traditionally only obliges nation states to pass certain laws, which in turn apply to transnational companies. The nation states in turn have to report their progress under these requirements, usually in the form of an action plan. Apart from this, there are, at least so far, no binding international law norms on issues of corporate social responsibility, which directly apply to transnational companies.[6] There are, however,

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[1] See the green paper of the Commission of the European Communities on promoting a European framework for corporate social responsibility, dated as of 18 July 2001, COM (2001) 336, at 6.

[2] Howard R Bowen, *Social Responsibilities of the Businessman* (New York: Harper, 1953); Keith Davis, *Can Business Afford to Ignore Social Responsibilities?* 2 California Management Review 70-76 (1960); Keith Davis, *The Case for and against Business Assumption of Social Responsibilities* 16 Academy of Management Journal 312-322 (1973).

[3] Doreen McBarnet, *The New Corporate Accountability: Corporate Social Responsibility Beyond Law, Through Law, For Law* in Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 9-56 (Cambridge: Cambridge University Press, 2007), at 13-31 (beyond law), 31-44 (through law) and 44-54 (for law).

[4] See the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a renewed EU strategy 2011-14 for corporate social responsibility, dated as of 25 October 2011, COM (2011) 681, at 6.

[5] Rolf H Weber, *Corporate Social Responsibility as a Gap-Filling Instrument?* in Andrew P Newell (ed.), *Corporate Social Responsibility: Challenges, Benefits and Impact on Business Performance,* 87-107 (New York: Nova, 2014), at 90-91 (regulatory gaps) and 102-103 (filling the gap).

[6] The one exception to this general rule is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which establishes legally binding standards to

various international soft law standards on business and human rights, working conditions and industrial relations, business and the environment as well as anti-corruption issued by international organizations such as the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD) and the International Labour Organisation (ILO), which are, by definition, not binding on transnational companies. The most important soft law instruments include the UN Guiding Principles on Business and Human Rights (the UN Guiding Principles), the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (the ILO Tripartite Declaration). These soft law instruments are today more and more backed up by national governments, a fact that raises important questions as to their legal nature.

Against this backdrop, it is questionable how the role of the law in the current legal and regulatory framework on corporate social responsibility can best be described. This article aims at developing a better understanding of the interaction between different legal and regulatory approaches towards transnational companies to protect human rights, working conditions and the environment and to work against corruption in all its forms on the spectrum between self-regulation and government intervention. This article focuses not only on corporate social responsibility reporting, the main strategy of the European Union in this area, but also includes other procedural approaches. From the various forms of quasi- or co-regulation, it makes use of the concepts, models and theories of meta-regulation, responsive regulation and reflexive regulation. For this analysis, a socio-legal research approach towards the existing rules and standards on corporate social responsibility is implemented.[7] Reference is also made to legal and regulatory theory, as applied in the context of transnational governance, in order to gain more insights into the structure of the relevant rules and standards in this field.[8] In doing so, it is argued that the existing hybrid legal architecture related to corporate social responsibility can best be explained by a transnational governance model, which is based on several reciprocal and interrelated monitoring, enforcement and transparency mechanisms.

Monitoring and Meta-Regulation

An approach that is often used to capture developments at the intersection between self-regulation and government intervention, in particular where the government controls the self-monitoring activities of transnational companies, is the concept of

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criminalize bribery of foreign public officials in international business transactions and provides a host of related measures that make this effective.

[7] On law and society scholarship in general, see for example David N Schiff, *Socio-Legal Theory: Social Structure and Law* 39 Modern Law Review 287-310 (1976).

[8] On the foundations and applications of regulatory theory, see Peter Drahos & Martin Krygier, *Regulation, Institutions and Networks* in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications*, 1-24 (Acton: ANU Press, 2017).

meta-regulation. This concept can be defined as "the state's oversight of self-regulatory arrangements" or "regulating the regulator, whether they be public agencies, private corporate self-regulators or third-party gatekeepers".[9] By way of meta-regulation, the process of regulation itself, rather than the social and individual action behind it, becomes regulated.[10] The fundamental idea of meta-regulation is that self-regulation by the industry becomes regulated in one way or another.[11] Meta-regulation can in fact entail any form of regulation that regulates any other form of regulation such as legal regulation of self-regulation, non-legal methods of regulating internal corporate self-regulation or the regulation of national law-making by transnational bodies.[12] However, this concept has also led to criticism. FC Simon is particularly skeptical about the concept of meta-regulation and in her new book on the topic argues that "meta-regulation may not work as intended, and may actually trigger undesirable side effects".[13] She supports her thesis with both a theoretical alternative, based on Niklas Luhmann's system theory, and practical issues in connection with her professional experience in the Australian retail market for electricity and gas.

In the corporate social responsibility context, the concept of meta-regulation has been advanced in particular by Christine Parker.[14] Parker argues that meta-regulation in the field of corporate social responsibility must be aimed at making transnational companies put themselves through a process of corporate social responsibility aimed at corporate social responsibility outcomes.[15] It is her understanding that the regulatory technique needed in this area would not need to be in the form of the traditional, hierarchical, legal regulation promulgated by nation states, but might, rather, include international networks of governance and laws that authorize, empower, co-opt or recognize the regulatory influence of companies themselves, business associations and other industry bodies as well as pressure groups (including civil society) to set and enforce standards for corporate social responsibility processes and outcomes.[16]

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[9] See Bridget Hutter, *Risk, Regulation, and Management* in Peter Taylor-Gooby & Jens Zinn (eds.), *Risk in Social Science*, 202-227 (Oxford: Oxford University Press, 2006), at 215; Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy,* 15 (Cambridge: Cambridge University Press, 2002). See also Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation* in Robert Baldwin, Martin Cave & Martin Lodge (eds.), *The Oxford Handbook of Regulation*, 146-168 (Oxford: Oxford University Press, 2010).

[10] Bronwen Morgan, *The Economisation of Politics: Meta-Regulation as a Form of Nonjudicial Legality* 12 Social & Legal Studies 489-523 (2003), at 490.

[11] John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control* 80 Michigan Law Review 1466-1507 (1982); Peter Grabosky, *Meta-Regulation* in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications*, 149-161 (Acton: ANU Press, 2017), at 149.

[12] Christine Parker, *Meta-Regulation: Legal Accountability for Corporate Social Responsibility* in Doreen McBarnet, Aurora Voiculescu & Tom Campbell (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 207-237 (Cambridge: Cambridge University Press, 2007), at 211.

[13] FC Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality,* 4 (London: Routledge, 2017).

[14] Parker (fn. 9); Parker (fn. 12).

[15] Parker (fn. 12), at 207.

[16] Parker (fn. 12), at 208-209.

At the same time, other commentators such as Olufemi Amao have pointed out that this concept may be open to criticism because of its indeterminate nature.[17] The main critique of such a regulatory approach towards corporate social responsibility is that it would give legal backing to self-regulation and thereby undermine the law itself. By delegating power to transnational companies, it would create a non-transparent governance framework, which might perhaps do very little to improve the achievement of corporate social responsibility objectives. Despite this criticism, I use the concept of meta-regulation to explain how the (supra-) national legislator and other legislative bodies under current law and practice monitor various public or private regulators and vice versa.

An example of legal regulation of self-regulation by public agencies or supranational bodies is the incorporation of certain international soft law standards into (supra-) national legislation. The government could, for example, state explicitly which public codes of conduct it acknowledges. In this case, the state would name several standards, which are considered to be adequate, and oblige the companies to choose from this set (or menu). It is, however, entirely up to the respective company to choose the standard it wants to follow. This is somewhat similar to the regulation in accounting law, where the legislator provides a choice (i.e., the IFRS or GAAP international accounting standard) and the company selects the respective international standard. This approach forms part of section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act) on conflict minerals, which requires some companies to submit a report on the measures taken to exercise due diligence regarding the supply chain of conflict minerals.[18] The Final Rule of the US Securities and Exchange Commission for its implementation, dated as of 22 August 2012, specifies the standard for due diligence that must be exercised and states that companies must follow an internationally or nationally recognized due diligence framework, such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.[19] This approach is also followed in the Dutch Child Labour Due Diligence Proposal (the Dutch Proposal), which entails a similar due diligence provision. According to the Dutch Proposal, companies based in the Netherlands should act in accordance with the ILO Child Labour Guidance Tool for Business for the purpose of this due diligence review.[20] A similar approach was also implemented on the supranational level in the context of non-financial reporting: in June 2017, the European Commission published non-binding guidelines on the methodology for reporting non-financial information, which are supposed to help large companies to disclose the required environmental and social information.[21] According to these guidelines, the said com-

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[17] Olufemi Amao, *Corporate Social Responsibility, Human Rights and the Law: Multinational Corporations in Developing Countries,* 75 (Abingdon: Routledge, 2011).

[18] See section 1502(b)(p)(1)(a) of the Dodd-Frank Act.

[19] 17 CFR parts 240 and 249b, at 31.

[20] See article 7(1) of the Dutch Proposal.

[21] European Commission, Guidelines on non-financial reporting (methodology for reporting non-financial information), C/2017/4234, OJ C 215 of 5 July 2017. For further details on the relevant non-

panies may use certain national, European or international frameworks such as the UN Global Compact, the UN Guiding Principles, the OECD Guidelines, the ILO Tripartite Declaration, the ISO 26000 norm on social responsibility of the International Organization for Standardization or the Global Reporting Initiative to produce their statements.[22]

Examples of meta-regulation in the corporate social responsibility context through non-legal methods include the voluntary accreditation of codes of good conduct, as adopted by corporate self-regulators, by the government or international organizations on the one hand or the regulation of labelling practices by third-party gatekeepers on the other hand. One approach in this area consists of the approval by the government or international organizations of those private codes of conduct that incorporate certain core elements considered to be important. This is in fact what the UN Global Compact is doing by setting certain minimum standards in relation to human rights, labor, the environment and anti-corruption regarding the content of private codes of conduct.[23] The fact of being a participant of this voluntary initiative thus serves as some sort of accreditation, although the UN Global Compact does not provide a seal of approval, only a transparency mechanism.[24] Another approach in this area is the regulation of labelling practices of third-party gatekeepers such as Fairtrade International or the Ecolabel of the European Union.[25] The European Parliament has, on various occasions, promulgated different kinds of rules and regulations concerning this, such as a certification under the eco-management and audit scheme (EMAS), the organic logo or the Ecolabel of the European Union.[26]

Probably the most prominent example for regulation of national law-making by transnational bodies is the process of reporting and monitoring on a country level. This process is fairly common with regard to the implementation of European law in the member states of the European Union: every year, the European Union monitors and reports on the application of the relevant supranational law in all countries that

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financial reporting rules of the European Union, see the third paragraph of the section on transparency and reflexive regulation below.

[22] European Commission (fn. 21), at 19.

[23] See the ten principles of the UN Global Compact, available online at <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last accessed 31 December 2019).

[24] For a discussion of the main mechanics of the UN Global Compact, see the fifth paragraph of the section on transparency and reflexive regulation below.

[25] For more information on these fairtrade and environmental labels, see the websites of Fairtrade International (https://www.fairtrade.net) and the Ecolabel of the European Union (www.ecolabel.eu).

[26] See for example Regulation (EC) No 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme, OJ L 342 of 22 December 2009 (EMAS); Regulations (EU) No 271/2010 of 24 March 2010 as regards the organic production logo of the European Union, OJ L 84 of 31 March 2010 (organic logo); Regulations (EC) No 66/2010 of the European Parliament and the Council of 25 November 2009 on the EU Ecolabel, OJ L 27 of 30 January 2010 (Ecolabel). See also Regulation (EU) No 1169/2011 of the European Parliament and the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304 of 22 November 2011 (food labeling rules).

are member states of the Union.[27] In the context of corporate social responsibility, it is interesting to note that similar monitoring mechanisms exist with regard to business and human rights and international labor standards. With regard to business and human rights, it is fair to say that the UN Guiding Principles have a significant influence on the national legislation agenda because they have received so much support at the international level. At the same time, the UN Working Group on Business and Human Rights strongly encourages all states to develop, enact and update a national action plan on business and human rights as part of the state responsibility to disseminate and implement the UN Guiding Principles. For this purpose, and in order to facilitate this process, the working group has produced a Guidance on National Action Plans on Business and Human Rights, which provides certain recommendations to this end.[28] The nation states thus have to report their progress on the implementation of these standards in the form of a report. Many (about 22) states, including Switzerland, have already done so.[29] Others, in particular South American states, are still in the progress of implementing these measures, while a few others, in particular African states, have just begun this process.[30] As regards international labor standards, it is further worth noting that these standards are backed by the supervisory system of the ILO, which is quite unique at the international level. The ILO regularly examines the application of labor standards in member states and if there are any problems in the application of these standards, the ILO seeks to assist countries through social dialogue and technical assistance. There are basically two kinds of supervisory mechanisms in the ILO framework: the regular system of supervision, which involves periodic reports submitted by member states on the measures they have taken to implement the provisions of the ratified Conventions, and special procedures such as representation and complaint procedures of general application as well as a special procedure for complaints regarding freedom of association.[31]

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[27] See for example the 2018 Annual Report of the European Commission on monitoring the application of Union law, dated as of 4 July 2019, available online at <https://ec.europa.eu/info/sites/info/files/report-2018-annual-report-monitoring-application-eu-law.pdf> (last accessed 31 December 2019).

[28] UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, available online at <https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf> (last accessed 31 December 2019).

[29] See UN, *State National Action Plans on Business and Human Rights*, available online at <https://www.ohchr.org/en/issues/business/pages/nationalactionplans.aspx> (last accessed 31 December 2019). See also the report of the Swiss Federal Council on the Swiss strategy for the implementation of the UN Guiding Principles on business and human rights, dated as of 9 December 2016, available online at <https://www.newsd.admin.ch/newsd/message/attachments/48579.pdf> (last accessed 31 December 2019).

[30] See UN (fn. 29). See also the study of the European Parliament on the implementation of the UN Guiding Principles on business and human rights, dated as of 2 February 2017, available online at <http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf> (last accesed 31 December 2019).

[31] See ILO, *Applying and Promoting International Labour Standards*, available online at <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> (last accessed 31 December 2019).

As all these examples show, it must be acknowledged that today the law already plays an important role in the monitoring of several industry self-regulating arrangements and state legislation. Various soft law standards that, taken separately, indeed have no legally binding effect on transnational companies, all of the sudden become binding and must be followed by these companies. This can either be the case directly, by way of incorporation by reference, as in the case of section 1502 of the Dodd-Frank Act on conflict minerals or the Dutch Proposal on child labor, or indirectly, through the implementation of certain international soft law standards in the national legal system, as in the case of the UN Guiding Principles with regard to business and human rights. In this context, it is interesting to note that the OECD rules on conflict minerals and the ILO labor standards are to a large extent the most concrete sets of rules and standards in this area. Monitoring by way of meta-regulation is thus arguably a highly effective way how the law currently defines and controls certain corporate social responsibility issues of our time.

Enforcement and Responsive Regulation

Another approach in regulatory theory, which in particular focuses on enforcement, is responsive regulation. This approach suggests that governance should be responsive to the regulatory environment and to the conduct of the regulated entity in deciding whether a more or less interventionist response will be needed.[32] Responsive regulation in the tradition of Ian Ayres and John Braithwaite essentially promotes regulation through engagement and dialogue, while it is committed to learning and engages and empowers other stakeholders, also using the strategy of tripartism.[33] In their understanding of responsiveness, "public policy can effectively delegate government regulation of the marketplace to public interest groups […], to unregulated competitors of the regulated firms […] and even to the regulated firms themselves".[34] The best-known strategy of responsive regulation is the enforcement pyramid, which includes options for enforcement that escalate towards the top.[35] Critics argue, however, that responsive regulation is mainly about how to respond in the case of non-compliance but says little about designing inspections when goals are unclear or contested.[36] Scholars further pointed out that inspectors often lack the required knowledge to

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[32] John Braithwaite, *Types of Responsiveness* in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications*, 117-132 (Acton: ANU Press, 2017), at 117.

[33] Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York/Oxford: Oxford University Press, 1992). On tripartism, see Ian Ayres & John Braithwaite, *Tripartism: Regulatory Capture and Empowerment* 16 Law & Social Inquiry 435-496 (1991).

[34] Ayres & Braithwaite (fn. 33), at 4.

[35] See John Braithwaite, *The Essence of Responsive Regulation* 44 UBC Law Review 475-520 (2011). See also Suzanne Rutz, *Practicing Reflexive Regulation,* 16 (Rotterdam: Erasmus University Rotterdam, 2017).

[36] Robert Baldwin & Julia Black, *Really Responsive Regulation* 71 Modern Law Review 59-94 (2008), at 60-61.

determine the right stage of the pyramid applying to a given situation.[37] Several theories were set out to build on responsive regulation. Smart regulation, developed by Neil Gunningham, Peter Grabosky and Darren Sinclair, considerably broadens the scope of responsive regulation by expanding the one-dimensional pyramid focused on government action through self-regulation and a variety of actions by commercial and non-commercial third parties.[38] In the concept of "really responsive regulation", Robert Baldwin and Julia Black broaden the scope from selecting enforcement methods to enhance compliance to include other regulatory tasks.[39] The basic element of all these theories is that they enable an interactive learning process through a multi-stakeholder dialogue, which allows the regulated entity to revise its behavior in light of past experience.[40]

Although there are, at least in my perception, many applications of responsive regulation in the field of corporate social responsibility, in particular with regard to various enforcement mechanisms, it strikes me that the academic literature has so far failed to analyze and discuss any of these practical examples in greater detail. There are, after all, a few contributions that in some way or another link responsive regulation to corporate social responsibility. Jonathan Kolieb, for example, develops a refined concept, the so-called regulatory diamond, which is based on the general theory of responsive regulation, and applies this concept to business and human rights, conflict minerals and other corporate social responsibility issues.[41] Moreover, a recent PhD thesis, which focusses on regulatory theory related to corporate social responsibility in small and medium-sized enterprises, has devoted one section of the theory chapter to responsive regulation, but without drawing further inferences.[42] Besides these contributions, it is not difficult to see that various concepts of responsive regulation are today closely integrated into some of the most important international soft law standards on corporate social responsibility, in particular with a view to enforcement. In the following paragraphs of this section, I analyze and discuss dif-

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[37] Oren Perez, *Responsive Regulation and Second-Order Reflexity: On the Limits of Regulatory Intervention* 44 UBC Law Review 743-778 (2011), at 753-754.

[38] Neil Gunningham & Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); Neil Gunningham & Darren Sinclair*, Integrative Regulation: A Principle-Based Approach to Environmental Policy* 24 Law & Social Inquiry 853-896 (1999); Neil Gunningham & Darren Sinclair, *Regulatory Pluralism: Designing Policy Mixes for Environmental Protection* 21 Law & Policy 49-76 (1999).

[39] Baldwin & Black (fn. 36).

[40] See Colin Scott, *Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect* in Nina Boeger, Rachel Murray & Charlotte Villiers (eds.), *Perspectives on Corporate Social Responsibility*, 170-185 (Cheltenham: Edward Elgar, 2008); Rutz (fn. 35), at 16-17.

[41] Jonathan Kolieb, *When to Push, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond* 41 Monash University Law Review 136-162 (2015), at 155-158.

[42] Heath Evans, *Corporate Social Responsibility (CSR): Tailoring Regulation and Government Policy to the Needs of Small and Medium-Sized Enterprises,* 124-127 (Adelaide: University of Adelaide Law School, 2017).

ferent enforcement mechanisms contained in the UN Guiding Principles, the OECD Guidelines and the ILO Tripartite Declaration in this regard.

The third pillar of the UN framework on business and human rights is devoted to effective access to remedy "through judicial, administrative, legislative or other appropriate means".[43] Conceptually, this includes state-based judicial mechanisms, state-based non-judicial grievance mechanisms and non-state-based grievance mechanisms.[44] The liability provisions contained in the Swiss popular initiative on responsible business (the Responsible Business Initiative) and the respective counter-proposal of the Swiss House of Representatives are examples of how states may enhance the effectiveness of judicial mechanisms in the case of business-related human rights abuses.[45] Although these legislative proposals are not yet law, it is highly probable that Swiss private law will become tighter in this respect, in one form or another. Similar progress can also be documented with regard to the effectiveness of the Swiss state-based non-judicial grievance mechanisms in such cases: in its report on the Swiss strategy for the implementation of the UN Guiding Principles, the Swiss Federal Council points to the recent successes of dispute resolution support from representations abroad and underlines that it will continue to support its diplomatic missions in their dispute settlement efforts.[46] In addition, it is worth noting that the commentary of the UN Guiding Principles in particular makes reference to the theory of smart regulation by stating that nation states should also consider "a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights".[47] This approach is well illustrated by Switzerland's enforcement strategy in this regard as briefly outlined in this paragraph.

The OECD Guidelines cover in particular issues such as human rights, employment and industrial relations, the environment and anti-corruption, but also other topics such as consumer protection, science and technology, competition and taxation. Under the OECD Guidelines, since the year 2000 participating states are required to establish a national contact point.[48] The main role of the national contact points is to further the effectiveness of the OECD Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise from the

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[43] See foundational principle 25 of the UN Guiding Principles.

[44] See operating principles 26 (state-based judicial mechanisms), 27 (state-based non-judicial grievance mechanisms) and 28 (non-state-based grievance mechanisms) of the UN Guiding Principles.

[45] See draft article 101*a* para. 2(c) of the Swiss Constitution; draft article 55 para. 1bis of the Swiss Code of Obligations.

[46] See the report of the Swiss Federal Council on the Swiss strategy for the implementation of the UN Guiding Principles on business and human rights (fn. 29), at 39.

[47] See commentary on operational principle 3 of the UN Guiding Principles.

[48] See para. 11 of chapter I of the OECD Guidelines and chapter I of the procedural guidance to the OECD Guidelines. See also the report of the OECD on implementing the OECD guidelines for multinational enterprises (the national contact points from 2000 to 2015), dated as of 21 June 2016, availabe online at <https://mneguidelines.oecd.org/oecd-report-15-years-national-contact-points.pdf> (last accessed 31 December 2019).

alleged non-observance of the OECD Guidelines in specific instances.[49] Switzerland, for example, already established such a national contact point in the year 2000; since then it has been operated by the Swiss State Secretariat for Economic Affairs.[50] The Swiss national contact point has heard and (successfully) mediated many disputes related to corporate social responsibility.[51] The OECD Guidelines are therefore a good example of how national legislation can support and assist the enforcement of certain international standards.

The ILO Tripartite Declaration, which is mainly concerned about international labor standards, has for a long time not provided any enforcement mechanism at all. Since the latest revision of the ILO Tripartite Declaration in March 2017, this instrument now also provides for tripartite appointed national focal points, which shall promote the use of the ILO Tripartite Declaration and its principles at the national level. The national focal points may in particular wish to organize "dialogue platforms for the tripartite constituents and multinational enterprises to discuss opportunities and identify challenges presented by operations of multinational enterprises in the national context".[52] Such dialogues could also encompass dialogues between home and host countries.[53] Tripartism and stakeholder dialogues, which lie at the heart of responsive regulation, are thus also an important element of the revised ILO Tripartite Declaration. As Portugal and Senegal, followed by Côte d'Ivoire, Jamaica, Norway and Sierra Leone, have already appointed their national focal points, and many more countries are expected to join them in their efforts, this is where an element of government intervention and thus national law comes into play.[54]

All three of these UN, OECD and ILO instruments are good examples of how national governments help considerably in enforcing the respective international soft law standards, be it through judicial or non-judicial mechanisms by state actors. An interesting development with regard to corporate civil liability is the current debate and (anticipated) upcoming popular vote on the Responsible Business Initiative in Switzerland. At the end of the day, it is a question of a country's national law and up to the sovereignty of the respective nation state to decide, in a democratic process, in

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[49] See OECD, *National Contact Points*, available online at <http://mneguidelines.oecd.org/ncps> (last accessed 31 December 2019).

[50] See the Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for Multinational Enterprises and on its Advisory Board of 1 May 2013, SR 946.15.

[51] See Swiss State Secretariat for Economic Affairs, *Information on Specific Cases*, available online at <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html> (last accessed 31 December 2019).

[52] See operational tool 1(b) of the ILO Tripartite Declaration.

[53] See operational tool 1(b) and para. 12 of the ILO Tripartite Declaration.

[54] On the progress of the appointment of national focal points, see ILO, *Senegal Appoints Four National Focal Points and Lays the Foundations of a National Promotion Strategy*, available online at <https://www.ilo.org/empent/units/multinational-enterprises/WCMS_616830/lang--en/index.htm> (last accessed 31 December 2019); ILO, *Promotion at the National Level / Promotion by Tripartite Appointed National Focal Points*, available online at <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570379/lang--en/index.htm> (last accessed 31 December 2019).

which way and to what extent it wants to provide for such a remedy. The provision of an effective remedy under the UN Guiding Principles, the establishment of national contact points under the OECD Guidelines and the promotion of national focal points under the ILO Tripartite Declaration at least clearly show that nation states are already today deeply involved in this process. The methods and models of responsive regulation may thus provide a powerful explanation of how national public and private law is enforcing international soft law standards in the area of corporate social responsibility.

Transparency and Reflexive Regulation

Yet another approach between the law and the market is reflexive regulation, which goes back to the work of Gunther Teubner ("reflexive law").[55] The theory of reflexive law applies procedures to those procedures that steer and foster self-regulation within social institutions.[56] An early critic of this school of thought was Erhard Blankenburg.[57] Probably the main criticism of the reflexive law theory is that it unduly delegates authority and decision making to irresponsible powers, undermines the rule of law and democracy and rests on untenable premises.[58] This theory has been further criticized for neither establishing formal rules of interaction nor directing substantive outcomes.[59] Similar approaches have also been put forward by Philip Selznick ("responsive law") and Jürgen Habermas ("procedural law").[60] All these theories focus on procedural norms, which concentrate on the development of regulatory mechanisms, which are in turn aimed at achieving intended outcomes.[61] Similar to meta-regulation, under each of these theories, the law avoids the need to directly regulate complex social areas, but focuses on controlling the structure and processes

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[55] Gunther Teubner, *Substantive and Reflexive Elements in Modern Law* 17 Law & Society Review 239-286 (1983); Gunter Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg* 18 Law & Society Review 291-301 (1984).

[56] Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm,* 4 (New Jersey: Princeton University Press, 2002).

[57] Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"* 18 Law & Society Review 273-290 (1984).

[58] Cohen (fn. 56), at 17; Amao (fn. 17), at 77.

[59] Richard B Stewart, *A New Generation of Environmental Regulation* 29 Capital University Law Review 21-182 (2001), at 130; Warren A Braunig, *Reflexive Law Solutions for Factory Farm Pollution* 80 New York University Law Review 1505-1548 (2005), at 1525.

[60] Philip Selznick, *Sociology and Natural Law* 6 Natural Law Forum 84-108 (1961); Philip Selznick, *Law, Society, and Industrial Justice* (New York: Russel Sage Foundation, 1969); Philippe Nonet & Philip Selznick, *Law and Society in Transition: Towards Responsive Law* (New York: Harper and Row, 1978); Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Berlin: Suhrkamp, 1992); Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996).

[61] Cohen (fn. 56), at 4.

of self-regulation. Unlike substantive law and other than meta-regulation, however, these theories do not dictate any particular outcome.

Several scholars have applied theories based on reflexive regulation to corporate social responsibility and transparency. Colin Scott and Olufemi Amao have written about reflexive governance and corporate social responsibility more generally.[62] Catherine Barnard, Simon Deakin and Richard Hobbs in particular looked at reflexive law and the evolution of labor standards.[63] Karin Buhmann has recently argued that the Danish reporting requirement on corporate social responsibility is based on an understanding of reflexive law theory.[64] In her article, she argues that the Danish reporting requirement exemplifies the application of reflexive law as a regulatory strategy applied to push company self-regulation in a direction defined by public law standards and policy objectives in areas such as human and labor rights, environmental and climate change mitigation and anti-corruption. Similarly, Shuangge Wen critically examines the mechanics of reflexive law in relation to business disclosure under the UK Modern Slavery Act of 2015 (the Modern Slavery Act), concluding that transparency is a necessary, but not sufficient legal strategy to respect human rights and to eliminate slavery practices in global supply chains.[65] Although the need for transparency seems widely acknowledged in the field of corporate social responsibility, Wim Dubbink, Johan Graafland and Luc van Liedekerke have nevertheless expressed some reservations with this idea.[66] They argue that both a facilitation policy and a command and control strategy are defective and introduce an alternative government policy, consisting of the development of a self-regulating sub-system in the form of informational intermediate organizations. As I will show in the following paragraphs, various transparency-related legal strategies can be explained by drawing on theories of reflexive regulation.

The idea that corporate social responsibility reporting might qualify as reflexive law is not new.[67] It was in fact John Elkington who coined the phrase "the triple bot-

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[62] Scott (fn. 40); Olufemi Amao, *Reflexive Law and the CSR Debate – Reflexive Law: Does It Have any Relevance to the Corporate Social Responsibility (CSR) Debate?* 6 Cork Online Law Review 55-64 (2007).

[63] Catherine Barnard, Simon Deakin & Richard Hobbs, *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time*, ESRC Centre for Business Research, University of Cambridge, Working Paper No 294, avaliable online at <https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/working-papers/wp294.pdf> (last accessed 31 December 2019).

[64] Karin Buhmann, *The Danish CSR Reporting Requirement as Reflexive Law: Employing CSR as a Modality to Promote Public Policy Objectives through Law* 24 European Business Law Review 187-216 (2013).

[65] Shuangge Wen, *The Cogs and Wheels of Reflexive Law – Business Disclosure under the Modern Slavery Act* 43 Journal of Law and Society 327-359 (2016), at 357-359.

[66] Wim Dubbink, Johan Graafland & Luc van Liedekerke, *CSR, Transparency and the Role of Intermediate Organisations* 82 Journal of Business Ethics 391-406 (2008).

[67] See David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness* 25 Journal of Corporation Law 41-84 (1999); Amao (fn. 62); Buhmann (fn. 64); Wen (fn. 65).

tom line" as early as 1994.[68] The triple bottom line basically refers to the reporting of profits, people and the planet to the public and the various stakeholders. There are many examples of rules and regulations on corporate social responsibility reporting. Denmark and France were certainly the forerunners in this area. Since January 2009, Danish listed and state-owned public limited companies with assets or liabilities of EUR 19.2 million, revenue of EUR 38.5 million and more than 250 employees had a legal obligation to report on corporate social responsibility in a separate sustainability report.[69] Since December 2011, French listed and unlisted companies with more than 500 employees and EUR 100 million in revenue also had similar reporting obligations within the scope of their annual reports.[70] Under these regimes, the respective companies had to inform the public and its investors about the existence or non-existence of corporate social responsibility strategies, their implementation and their results. A more recent example for this strategy on the supranational level is the directive of the European Union on the disclosure of non-financial and diversity information by certain large undertakings and groups (the CSR Directive), which was adopted in 2014 and became effective in 2017.[71] Under the CSR Directive, large public-interest companies with more than 500 employees have to publish reports on the policies they implement in relation to environment protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery as well as diversity on company boards. The CSR Directive gives companies significant flexibility to disclose relevant information in the way they consider most useful, while they may rely on certain international guidelines such as the UN Global Compact, the OECD Guidelines or ISO 26000. Other examples of national disclosure legislation include the California Transparency in Supply Chain Act of 2010 (the Supply Chain Act), which requires every retail seller and manufacturer doing business in California, with worldwide gross receipts that exceed USD 100 million, to disclose their efforts to eradicate slavery and human trafficking from their supply chains, and the already mentioned Modern Slavery Act, which requires commercial organizations to prepare a slavery and human trafficking statement on a yearly basis.[72]

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[68] The Economist of 17 November 2009, *Triple Bottom Line*, available online at <https://www.economist.com/node/14301663> (last accessed 31 December 2019).

[69] See the Grenelle I Act of 3 August 2009 (establishing an action plan on governance issues) and the Grenelle II Act of 12 July 2010 (introducing article 224 on socially responsible investment and article 225 on corporate social responsibility in the French legislation).

[70] Act amending the Danish Financial Statement Act (Accounting for CSR in large businesses) of 16 December 2008.

[71] Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups of 22 October 2014. On the implementation of the CSR Directive in selected member states, see the report of the Swiss Institute of Comparative Law on the implementation of the CSR Directive, entitled *Umsetzung der Richtlinie 2014/95/EU (CSR-Richtlinie): Dänemark, Deutschland, Belgien, Finnland, Frankreich, Niederlande, Österreich, Schweden, Vereinigtes Königreich*, dated as of 30 April 2017, available online at <https://www.isdc.ch/media/1378/e-2017-12-16-173-richtlinie-2014-95-gz.pdf> (last accessed 31 December 2019).

[72] See section 1714.43(a)(1) of the Supply Chain Act and section 54(1) of the Modern Slavery Act.

At the same time, various disclosure-based schemes, which not only involve reporting to stakeholders, but also to a regulatory agency or third-party gatekeeper, and some sort of centralized information database or public register, are good examples of reflexive law in action, namely in the field of environmental law.[73] Perhaps the best-known example in environment regulation is the US Toxics Release Inventory. This publicly available database contains information on toxic chemical releases and other waste management activities in the United States and aims to reduce emissions, as required under section 313 of the US Emergency Planning and Community Rights-to-Know Act of 1986 (the Emergency Planning Act).[74] Under the Emergency Planning Act, regulated entities are required to submit annual data on the volumes of certain toxic chemicals released into the air, water or land or transferred off-site to the US Environmental Protection Agency, which in turn makes this information publically accessible through an online database or otherwise.[75] Another example from the European regulatory landscape is the eco-management and audit scheme of the European Union. This scheme, in short EMAS, is a voluntary environmental management system for companies and other organizations to improve, evaluate and report their environmental performance on an annual basis.[76] One key element of EMAS is that there is not only the need for an internal environmental audit by the company, but also an external verification and validation by an independent environmental verifier. In addition, the European Commission hosts a publically accessible online database, which lists all registered organizations and sites. What makes this form of transparency different from pure reporting on corporate social responsibility, as discussed in the preceding paragraph, is the actors involved (regulatory agency or third-party gatekeeper) and the form of disclosure (information database or public register).

And last but not least, it should be mentioned that the UN Global Compact, for example, does not have either a monitoring or an enforcement mechanism, but operates entirely on the basis of openness and transparency. All participating companies of the UN Global Compact are expected to publish a description of the ways in which they are supporting the UN Global Compact and its ten principles in their annual report or a similar corporate report (i.e., the sustainability report).[77] The so-called communication on progress procedure, which is at the heart of a company's commitment to the UN Global Compact, is a very flexible format, with only three minimum requirements: it must contain a statement made by the CEO expressing continuing support of the UN Global Compact and renewing its ongoing commitment to the

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[73] See Eric W Orts, *Reflexive Environmental Law* 89 Northwestern University Law Review 1227-1340 (1995); Rónán Kennedy, *Rethinking Reflexive Law for the Information Age: Hybrid and Flexible Regulation by Disclosure* 7 Journal of Energy and Environmental Law 124-139 (2016).

[74] Pub L No 99-499, 100 Stat 1728 (codified and amended at 42 USC §§ 11001-11050 [2012]).

[75] 42 USC § 11022 (2012).

[76] For a detailed description of the ten steps of this scheme, see European Commission, *How Does It Work?*, available online at <http://ec.europa.eu/environment/emas/join_emas/how_does_it_work_step0_en.htm> (last accessed 31 December 2019).

[77] See UN, *Create and Submit your CoP*, available online at <https://www.unglobalcompact.org/participation/report/cop/create-and-submit> (last accessed 31 December 2019).

initiative; a description of practical actions the company has taken or plans to take to implement the ten principles; and a measurement of outcomes.[78] As the staff members of the UN Global Compact team collaborate with other frameworks, such as the Global Reporting Initiative, this is where the law eventually comes in. This form of transparency is different from the other disclosure rules and regulations, as discussed in the two preceding paragraphs, as there is only a very light direction by the law, if any at all, as the UN Global Compact is a non-binding policy initiative and participation in that initiative is entirely voluntary.

All these examples support the claim that transparency is an important element in regulating corporate social responsibility. It must be assumed, however, that a strategy based on transparency mechanisms alone most likely cannot solve the problems that might arise out of irresponsible and socially harmful business practices of transnational companies. Transparency is in my view nevertheless an important element in any policy solution mix. The previous paragraphs illustrate that transparency often comes in different forms and varying degrees of intensity: from a pure reporting requirement to a qualified disclosure-based regime with some state involvement or a light transparency mechanism with no or almost no link to the law. In imposing or suggesting certain disclosure measures on various corporate social responsibility issues, the law, in an indirect and reflexive way, regulates corporate behavior in relation to these issues. Reflexive regulation, in the tradition of reflexive law theory or other related schools of thought, provides thus a very useful theoretical concept of how legal strategies based on transparency operate in this context.

Conclusion

The purpose of this article has been to show some of the interactions between corporate social responsibility and the law. While it might sometimes be perceived that there is some sort of governance gap between what public international law demands and what the national law prescribes, this article is a simple attempt to show that this perception does in reality not, at least no longer, hold true. It has been shown that today there is in fact a clear trend towards a convergence of these two, in principle, very different bodies of the law and that there is a lot of interaction taking place between international soft law standards and national public and private law rules. Pursuant to the discussions and illustrations in the preceding sections, this is probably most evident with regard to the enforcement of the UN Guiding Principles, the OECD Guidelines and the ILO Tripartite Declaration. From an efficiency point of view, it might even be the case that many of the described non-judicial enforcement mechanisms are in practice actually much more effective than the enforcement of hard liability rules before state courts, although this mechanism certainly has its justifications. The same logic of course applies to the monitoring and transparency dimensions

[78] See UN, *The Communication on Progress (CoP) in Brief*, available online at <https://www.unglobalcompact.org/participation/report/cop> (last accessed 31 December 2019).

of the argument, mainly because various new legal acts and regulations have been adopted over the past few years that strengthen the international legal and policy framework in this regard.

From a transnational governance perspective, the existing hybrid legal architecture on corporate social responsibility, in which many legal and policy instruments are connected to each other and eventually overlap, can in my view best be described as a complex interaction between various monitoring, enforcement and transparency mechanisms. From a monitoring perspective, the various examples discussed in this article attest how the law – often in very subtle, indirect ways – regulates industry self-regulation, thereby essentially turning non-binding soft law standards into binding legal rules. As there are currently many different dialogue platforms in place, such as the national contact points according to the OECD Guidelines or the national focal points pursuant to the ILO Tripartite Declaration, the involvement of various stakeholders in the enforcement process is nowadays also much facilitated by the law. On top of that, transparency schemes and disclosure rules and regulations, which come in several different forms and with a varying degree of intensity, ensure that the relevant market and reputation mechanisms are working as they should. These three concentric circles of regulatory instruments are in my view the main mechanisms that put the law on corporate social responsibility into action.

At the same time, legal and regulatory theory has certainly provided a rich stock of transnational governance tools, which allow for a deeper analysis of this hybrid legal architecture. In the concept of meta-regulation, for example, the process of regulation itself becomes regulated, mainly by controlling the structures and processes of self-regulation, but sometimes also by dictating a particular outcome. Many of the models of responsive regulation that have been introduced focus in particular on enforcement and enable an interactive learning process through a multi-stakeholder dialogue, which allows the regulated entity to revise its behavior in light of past experience. Similarly, all mentioned theories on reflexive regulation essentially focus on procedural norms, which concentrate on the development of regulatory mechanisms, and in their turn aim at achieving intended outcomes. Therefore, some of the core elements of the transnational governance structures in the field of corporate social responsibility are the presence and activity of more than just a single regulator – the regulators basically form a network among themselves and control each other – and the insight that we today live in a multilevel regulatory framework, which includes binding instruments on the international, supranational and national level as well as non-binding instruments by international organizations, industries and pressure groups and transnational companies themselves.

The main thesis put forward in this article is that national public and private law already today regulates many issues of corporate social responsibility, although not in the identical tone and mode as public international law, which is embodied in various international soft law standards. It has been shown that we do not live in an unregulated wasteland in terms of corporate social responsibility, but that the law in many ways monitors and enforces the industry self-regulating initiatives that are currently in place and makes the underlying issues more transparent. In this understand-

ing, the law basically supports and reinforces international soft law standards by way of a transnational governance framework, which is at the core based on a certain set of monitoring, enforcement and transparency mechanisms. We must hope that this path, which seems to be very promising in the field of corporate social responsibility, will be further developed and refined in any upcoming law and regulatory reform in this area.